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No. 84-1258

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CHEMICAL BANK AND
WASHINGTON PUBLIC POWER SUPPLY SYSTEM,

Petitioners,

v.

PUBLIC UTILITY DISTRICT NO. 1 OF BENTON COUNTY, WASHINGTON, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The American Association of Retired Persons ("AARP") respectfully moves pursuant to Rules 36.1 and 42 of the Rules of this Court for leave to file the brief annexed hereto as *amicus curiae* supporting the petition for a writ of certiorari.

AARP, of 1909 K Street, N.W., Washington, D.C. 20049, is a not-for-profit membership corporation of more than 18 million persons over the age of 50. AARP is the largest organized group of older Americans in the country. In representing the interests of its members, AARP seeks to: (a) enhance the quality of life for older persons; (b) promote independence, dignity

and purpose for older persons; (c) lead in determining the role and place of older persons in society; (d) sponsor research on physical, psychological, social, economic and other aspects of aging; and (e) represent the point of view of older persons as members of the investing public.

In support of its motion AARP states:

1. While the petitioners have consented to the filing of the brief, AARP has been unable to obtain the consent of all of the respondents.

2. The decision of the Supreme Court of the State of Washington upholding the participants' renunciation of their obligations raises questions of broad importance to the security of investments in the national municipal bond market.

3. As explained more fully in the attached brief, that decision, if allowed to stand, will cause serious hardship to thousands of older Americans who invested in the bonds at issue, often in a unique manner because of their age, and will substantially and adversely affect the interests of other older Americans throughout this country who depend on the security of the national municipal bond market to provide for their retirement. For those reasons, AARP, on behalf of its 18 million members and all older Americans, has a vital and continuing interest in a review by this Court of the questions presented by the petition.

Dated: New York, New York
March 4, 1985

Respectfully submitted,

MILLER, SINGER & RAIVES, P.C.

By: /s/ ALFRED MILLER

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BRIEF *AMICUS CURIAE* OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTEREST OF *AMICUS CURIAE*

The American Association of Retired Persons ("AARP"), of 1909 K Street, N.W., Washington, D.C. 20049, is a not-for-profit membership corporation of more than 18 million persons over the age of 50. AARP is the largest organized group of older Americans in the country. In representing the interests of its members, AARP seeks to: (a) enhance the quality of life for

older persons; (b) promote independence, dignity and purpose for older persons; (c) lead in determining the role and place of older persons in society; (d) sponsor research on physical, psychological, social, economic and other aspects of aging; and (e) represent the point of view of older persons as members of the investing public.

There is no practicable way for AARP to know exactly how many of the estimated 45,000 holders of Washington Public Power Supply System ("WPPSS") 4 and 5 bonds are older persons. It is apparent, however, that a significant number of holders of those bonds are older persons who are members or are entitled to be members of the Association.[1] The Association has received many letters (and has been made aware of many others) from older persons setting forth their reliance as bondholders upon the contractual obligations of the participating municipalities and pointing out the hardships that the unprecedented decision of the Washington Supreme Court has created for them. These letters show that the adverse impact of the actions by the respondents has fallen heavily on older persons, in large part because of their age.[2]

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[1] For example, the Association has been advised that Chemical Bank estimates that there are 8,000 bondholders in Florida. Since Florida has the highest percentage of persons 65 or older in the United States (17.4% of population in 1982, *see* Bureau of Census, Statistical Abstract of the United States 34 (1984)), and families headed by persons over 65 are more likely to own municipal securities than are families headed by younger persons, *see* Fed. Res. Bull. 687 (1984), it is reasonable to infer that a significant percentage of those bondholders are older Americans.

[2] Examples of such letters are as follows (all spelling as in originals):

"I have 2 $5,000.00 bonds in WPPSS 4 & 5. I just like you to know I live on a very small Pension & that $100.00 a month in divideens ment I could have food when I wanted to buy. But now I'll have to think twice after Jan. 1st no dividen. Its a terrible thing they have done to a lot of poor widows, like me."

* * *

"We are very concerned with W.P.P.S.S. # 4 & 5 Projects as we have nearly all our retirement funds there. We have nothing beside S.S. to live on in

The participants' repudiation of their obligations, and the decision by the Washington Supreme Court allowing that repudiation without remedy, have imposed an unwarranted economic burden on these and thousands of other retired bondholders. It is on behalf of the many older persons who are holders of these bonds, among others, that AARP urges this Court to grant certiorari in this critically important case.

SUMMARY OF ARGUMENT

AARP urges this Court to review the decision of the Supreme Court of the State of Washington and to rectify the grave injustice that has been done to a substantial number of bondholders who are older Americans. As the largest organized

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(footnote con'd)
retirement and our loaning to W.P.P.S.S. and the participating utilities was done in good faith and believing they would repay said loan."

* * *

"I am a senior citizen, a widow, and will feel the loss of this income. It is not fair that the citizens of the state of Washington should get cheap utility rates at the expense of others. If their rates were raised and they paid off their honest debts then I too could pay my utility bill and keep my home nice and cozy; instead, I must use cardboard screens to keep warm & be able to pay the rate [my local utility] finds necessary to charge in order to pay off its bonded indebtedness."

* * *

"This is a very difficult loss for me. I am nearing retirement age and with the social security system being strapped so badly and cuts predicted, I felt I would have to rely more upon my own resources in the future."

* * *

"I am a widow (84 years old in August 1984) and have a very tight Interest Income which has never been enough to take care of my expenses. I was assured when I bought this Bond that I will be paid regular Interest on it. Without the Interest from this Bond it will make my Life much harder yet....I assure you this is more important to me than to somebody who has plenty to live on."

* * *

"Now I am the holder of these defaulted WPPSS bonds for almost all my life's savings -- and at this stage of my life, I can look ahead only to a very dim and precarious future."

group of older Americans in the country, AARP has become keenly aware of the disproportionate impact upon older persons of the state court's decision. This perspective clarifies the reasons why the participants' renunciation of their obligations was a taking which requires compensation.

Plainly, the economic impact of the participants' renunciation is harshest where it falls on individuals who had invested their life's savings in WPPSS bonds. Unless the decision below is reversed, these bondholders will have had their investments wiped out entirely — a result which will be catastrophic for them.

Moreover, the many older persons who own other municipal bonds will have reason to fear that other municipalities to which they loaned their savings might also be able to avoid their debts. Yet the need to rely upon the purported security of their investments and avoid risk is greater on the part of older Americans who invest their savings in municipal bonds than for younger persons. Older citizens rely particularly heavily on assurances regarding the safety of their investments such as the ones that were advanced here by the participants and confirmed by independent counsel.

Insofar as any analysis of the Takings Clause[3] accounts for the ability of the injured parties to protect their interests or to receive countervailing benefits through the political process, this Court should recognize that older victims of the WPPSS default have nowhere else to turn for protection against the municipal confiscation permitted by the decision of the court below. Most of the bonds were sold outside of Washington State to non-Washington residents. The loss suffered by the out-of-state bondholders will not be offset by any share in benefits associated with the pursuit by Washington municipalities of the local interests of their own residents and taxpapers.

ARGUMENT

AARP seeks here to highlight the reasons why the impact of the

[3] U.S. Const. amend. V, cl...4.

Washington court's decision on older persons makes this case particularly deserving of review by this Court.

The Takings Clause was designed to prevent governmental action that would require "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). *See also, Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980). The policies underlying the Clause, and the need for this Court to act to vindicate its purposes, are at their height when the people who are adversely affected by governmental overreaching are those, such as older persons, who are the least able to protect themselves and who, in consequence, suffer greater losses, can hope for fewer countervailing benefits, and have less ability than others to defend themselves effectively against majoritarian abuse.

In deciding whether the Takings Clause should afford protection under particular circumstances, this Court has identified several factors that determine whether compensation must be paid for losses imposed on individuals for the purported benefit of the public. The key factors are (1) the economic impact of the governmental action, (2) the extent to which the action interferes with reasonable, investment backed expectations, and (3) whether the governmental action is merely part of a regulatory program, imposed on all citizens, adjusting the benefits and burdens of economic life to promote the common good by implementing valid public purposes. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978); *PruneYard Shopping Center v. Robbins*, 447 U.S. 74, 83 (1980). These factors point all the more strongly toward requiring compensation in this case since the actions of the municipalities have had a devastating economic impact upon individual bondholders who are older persons particularly vulnerable to such harm.

The economic impact of a total loss of an investment is substantial for anyone, but it falls particularly harshly on the older person who depends upon investment income for his present and future livelihood. The Constitution should be interpreted in light of this reality, and, as it has often done in the

past, this Court should take the actual impact of governmental actions on the persons affected into account in doing so. Accordingly, the disproportionate harm caused to older persons by the actions of the participants in this case should be considered when deciding whether to review the decision below.

Because of older persons' dependence upon income they receive from the investment of their past wages, their security depends upon their ability to choose safe investments. Typically, an important investment goal of an older person is to maintain his principal intact to protect against the risk of poverty in old age, the possible need to pay high medical expenses, and the prospect of becoming wholly dependent upon his children or the state. Municipal bonds of the type issued by WPPSS have particular appeal to persons providing for their retirement, who value the security of a debt obligation and are less inclined to gamble upon the larger gains that might accompany a more risky equity investment. In this context, the assurances given by the participants as to the safety of the bondholders' investment — assurances often repeated and endorsed by independent bond counsel — take on a heightened significance. The expectations which were dashed in this case were more than just "reasonable" and "investment backed." They were the *sine qua non* for selling bonds to purchasers who were known to include many persons for whom the safety of governmental promises to repay loans was at the very essence of the bargain. Any analysis of the applications of the Takings Clause to this case should take that factor into account.

This Court's consideration of the "character of the governmental action" involved in this case should also take account of the lack of any other substantial relationship between the bondholders and the municipalities who have repudiated their promises. The respondents may try to justify their actions, and the decision of the court below, as merely part of the normal adjustment of the benefits and burdens of economic life for the public good. But whose and what "public good" is being served? Relatively few of the bondholders live in the Northwest, much less in the municipalities on whose behalf their funds were

spent. Out-of-state investors, especially those who are older persons, will not have much further involvement with the governments which have taken their property. They cannot hope to benefit from some countervailing, favorable policies (for example, cheaper power) made possible by the "program" being pursued by the municipalities. AARP submits that the participants' actions and the decision of the court below endorsing those actions and refusing to return the bondholders' funds, serve no plausible public purpose whose breadth is consistent with the nationwide distribution of the bondholders. The draconian substantive *ultra vires* rule invented by the court below accomplishes a total seizure of the bondholders' funds, yet does not and could not credibly explain what public good – other than enlarging the funds available to certain local municipalities – is served by visiting this result on the nationwide group of bondholders.

The bondholders' only realistic remedy is that which can be provided by this Court's review and reversal of the decision below. In the main, the non-resident bondholders cannot play any meaningful role in the political processes that led to the renunciation of the participants' obligations. They cannot expect that state judicial processes will protect them against the parochial pressures that so clearly shaped the result reached below. And insofar as they are older persons, they cannot simply return to work to recoup the substantial portions of their life's savings which they have lost. They are particularly dependent upon whether this Court will hold on the merits that the irresponsible acts of local municipalities who have repudiated their prior solemn assurances can be allowed to stand.

AARP accordingly requests this Court to rule upon the question of whether the Takings Clause imposes a limit on the extent to which governmental bodies may first induce investments in reliance upon their purported safety, then expend these funds, and later without justification decide not to repay or replace any of the bondholders' funds. AARP respectfully submits that, on consideration of the questions presented by the petititon, this Court should grant the writ.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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